***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-7400

*To be argued by*
PAUL Z. LEWIS

In The

# United States Court of Appeals

For The Second Circuit

MARIAN GATEFIELD,

*Plaintiff-Appellee,*

*vs.*

ADVANCED COMPUTER TECHNIQUES CORPORATION,

*Defendant-Appellant.*

*On Appeal from a Judgment of the United States District Court for the Southern District of New York.*



## BRIEF FOR DEFENDANT-APPELLANT

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## Statement of Issues Presented for Review

1. Is there cause for an employer to discharge an experienced, skilled manager for taking a two-month leave of absence in the middle of an admittedly "important" and innovative technical project for a major new client, despite the employer's request that she remain?

2. Is there a basis for granting a new trial when the appellant has found newly discovered evidence that conclusively demonstrates that (a) plaintiff lied to the jury, and (b) confirms her knowledge that taking a leave of absence would result in her discharge?

3. Is the admission of evidence of damages other than lost salary, in a breach of employment case, prejudicial error, as a matter of New York law?

4. Is it error for the Court to refuse to charge the jury to reduce damages for lost wages by the amount of unemployment benefits received by plaintiff?

## Statement of the Case

Plaintiff commenced this action to recover damages for alleged breach of an employment contract with Advanced Computer Techniques Corp., her employer. The contract provided that "the employer shall have the right to terminate this agreement immediately at any time for cause."

Plaintiff was an experienced systems analyst and manager of the design phase of the COINS project, an innovative money management system that ACT had won the right to design for First National City Bank in heavy bidding competition with many major computer companies.

Plaintiff was terminated by ACT's president, Mr. Lecht, on June 2, 1976, because she had left for a two-month leave of absence to go to England, despite Mr. Lecht's request that she stay to continue work on

the COINS project for another week* (which she admitted he had said to her on May 30, her last day of work). The employment contract contained no provisions for leaves of absence and any leave of absence would be purely at the sufferance of ACT.

Plaintiff knew that the COINS contract provided that the First National City Bank had to approve replacements and knew that when she left no replacement had been found for her.

When plaintiff received the letter of termination, she made no inquiry of ACT, nor did she question nor protest the action taken by the company. In fact,

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* Mr. Lecht's testimony and that of Mr. Schachter, Executive Vice President, was that she was told on several occasions by them that she could not go until the project was completed (end of June). But while not directly contradicted by Ms. Gatefield, we will assume that Ms. Gatefield's testimony is viewed in the most favorable light.

Ms. Gatefield wrote to ACT on June 6,* to respond to what she knew and admitted was Mr. Lecht's letter of termination of June 2, but did not protest or question his actions, or the contents of his termination letter, which had explicitly charged that she had taken an unauthorized leave.

Trial was had and the jury was charged inter alia that if she had been granted permission to take a leave of absence, it was a wrongful breach of the contract to discharge her. The jury found for plaintiff. Defendant moved for judgment notwithstanding the verdict, for a new trial and a diminution of damages, which motions were denied by the Court.

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* This letter is dated June 1, 1975 -- one day before the letter of termination -- and ACT contends that it constitutes a clear acknowledgement on plaintiff's part that her conduct might well result in termination. Plaintiff contends that the June 1, 1975 date was a "mistake" and that she actually wrote it five days later on June 6, 1975.

## Statement of Facts

Plaintiff is a British citizen in the United States on a permanent resident visa (40a/2-16). At the time she was terminated by ACT, she was a project manager and senior systems analyst earning, according to Ms. Gatefield, $25,500 (51a/13-14).

### Nature of ACT's business

Defendant, Advanced Computer Techniques Corp. ("ACT"), is a corporation whose business is designing and implementing computer systems -- a "software house" (141a/17-20).

This is a highly competitive business (142a/9) which depends exclusively on the technical skills and abilities of its employees rather than the utilization of tangible assets (142a/2-16). In 1974 and 1975, the competitive pressures in the industry intensified as the economy revived and also because entry into the

market -- requiring no heavy capital outlays -- was relatively easy (142a/19 - 143a/4).

It was during this period of time that ACT became the winning bidder against considerable competition on a substantial project for First National City Bank. And it was during this period when the plaintiff, who was a manager of the project, left on a leave of absence at a time ACT management considered inimical to the interests of the company, a step for which she was terminated.

Because of competitive pressures, the industry has been characterized by low profit margins and many failures (142a/19 - 143a/15). In the context of the industry, ACT's profits of one to three percent for twelve years and losses for only two years, is considered good (143a/11-15).

Plaintiff's background

Ms. Gatefield began working for ACT in or about March of 1969 (43a/8) as a systems analyst and programmer (43a/11). She is highly skilled (144a/2) and regularly acted in a supervisory role on projects in which she was engaged (144a/6-9). Her employment was governed by the terms of a contract which contains no contractual right to any leaves of absence whatever (Exh. 3, 276a). In fact, the contract provided for vacations, but only when they were "consistent with the performance of [plaintiff's] duties." (Pl. Exh. 3, 276a; 95a/11-15).

When she was hired in 1969, Ms. Gatefield was paid $13,000 per year (51a/4). During the next six years, she had established herself as a highly skilled senior employee capable of supervisory responsibilities (144a/2-7) and her salary had risen, according to her, to $25,500 per year (41a/13-14).

May 30 was Ms. Gatefield's last day at ACT. On that day she left for what, she has contended, was at best, a two-month leave of absence that defendant had "asked" her not to take (127a/4). At the time she walked out, Ms. Gatefield was managing the design phase of the First National City Bank project, called COINS (145a/21 - 146a/2, 282a), a real-time money market trading system, the first of its kind in the country (148a/6-11).

By letter dated June 2, 1975 ACT's president, Charles Lecht, terminated plaintiff because of her leaving on the leave of absence (Pl. Exh. 4; 279a).

Plaintiff never rebutted Mr. Lecht's charge that she had gone on an unauthorized leave of absence (128a/2-6). Her only response was to seek employment (128a/7-10).

Ms. Gatefield had been working on the project since early April (149a/10-11), and the project was not scheduled to be completed until the end of June (150a/

13-16). Mr. Lecht, ACT's president, considered her refusal to remain with the company and with the project cause for terminating Ms. Gatefield, and did so on June 2, 1975 (209a/15-16), after warning her on May 30 that he might have to take that action (206a/5-18).

The COINS project

In April 1975, ACT had bid for, and was awarded a contract by First National City Bank (FNCB) for the design of this money management system -- the "COINS" project (145a/16 - 146a/1). The bidding was intensive, and the competing bidders included Honeywell and Informatics and other billion dollar or multi-million dollar companies (190a/13-23). ACT had to create this system from scratch without similar designs to use for reference (148a/9-11). Ms. Gatefield knew it was an "important project" (104a/11-12), and knew that FNCB was a "new client" (136a/15).

The project was originally scheduled as a twelve-week effort, but was subsequently extended to fourteen weeks (147a/8-13).

The company hoped that the work it had been retained to perform in April-June, 1975 on the COINS system would lead to a follow-on implementation contract in which the program created in the design phase (i.e., the original COINS contract) would be programmed into a computer system. ACT hoped to be awarded the implementation contract, but knew it would first have to perform its design contract to the bank's satisfaction (148a/12 - 149a/6).

Because of the innovative and complex nature of the COINS project and ACT's desire to perform sufficiently well so it could get the follow-on long-term implementation contract, it requested that Ms. Gatefield take part as a project manager, and she agreed (149a/20 - 150a/2; 96a/13-24). She also understood that

the COINS project was an "important" one for ACT (104a/1-12; 95a/23-24), and that ACT was actively seeking the follow-on contract (96a/10-12).

By letter dated April 8, 1975, ACT forwarded to First National City Bank a copy of the project schedule (Exh. P, 294a, et seq.). It shows Ms. Gatefield designated as senior consultant, second only to the project manager (104a/8-10), and scheduled to work for the entire project period (Exh. P, 294a, et seq.). Ms. Gatefield conceded that she had been familiar with that project schedule (97a/20-22). The project was scheduled to run through the end of June, 1975 (150a/13-16).

Steps leading to plaintiff's being terminated.

Ms. Gatefield requested permission to go on a two-month leave of absence beginning on May 23, 1975 (59a/15-17; 54a/4-7).

There is a divergence of testimony as to this request for leave, but we will rely on plaintiff's own version and the rebutted testimony for the within purposes.

When Ms. Gatefield, in April 1975, first requested a leave, Mr. Lecht was abroad (54a/8-16). Ms. Gatefield, herself, testified that when he returned in mid-May, he asked her to put the leave off for a week (61a/4-11).*

Ms. Gatefield admitted that on May 30, 1975, she had a further conversation with ACT's president, Charles Lecht, in which:

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* Charles Lecht, the president of ACT, testified that when he first learned of the request he forbade Ms. Gatefield to go on leave of absence on May 30, 1975, since it came in the middle of the COINS project (194a/15-22). Mr. Schachter, ACT;s executive vice president, also testified that although he had advised her in April during Mr. Lecht's absence that she could take a vacation in the summer, after June (149a/19 - 150a/8-15)., he later told Ms. Gatefield that she was not to leave on the leave of absence (156a/9-11). Ms. Gatefield never testified at all about Mr. Schachter's latter conversation, so his testimony remains unrebutted.

"He asked me if I would consider staying for another week as he was not completely happy about my replacement. He did not yet know whether he would prove to be technically competent."

(68a/17-20)

Ms. Gatefield knew that under the COINS contract replacements had to be approved by FNCB (115a/25 - 116a/1).

Plaintiff testified that her replacement was to have been a George Rosen (66a/18-19). But she admitted that Mr. Rosen had only been hired by ACT during the week of May 26, 1975 (67a/7-9), and that First National City Bank had not approved him as her replacement, and, in fact, did not even know of his existence.

"Q. So you didn't know on the last day of your employment whether Mr. Rosen had or had not been approved by the First National Bank, did you?

A. I knew he had not been approved because they didn't know of his existence."

(116a/21-25)

She then admitted that on May 30, 1975, Mr. Lecht had asked her not to leave.

"Q. You were upset that you had been terminated by ACT, is that right?

A. Yes.

Q. At the time you wrote this letter, Ms. Gatefield, you knew, did you not, that Mr. Lecht had asked you not to leave?

A. Yes, he asked me not to leave on May 30.

Q. And you knew that by leaving, you were going to be countermanding his directions, didn't you?

A. It was not a direction. It was a request.

Q. In other words, he asked you not to leave?

A. He asked me to stay for another week.

Q. And he asked you not to leave on May 30 and to be back the following week, isn't that right?

A. He did not ask me to be back the following week. He just asked me not to leave as I testified this morning.

Q. But you left.

A. I did leave."

(126a/22 - 127a/15)
(emphasis supplied)

Despite this warning, however, she left on her two-month leave of absence.

When Ms. Gatefield failed to show up for work on Monday, Juen 2, 1975, Mr. Lecht wrote her a letter of termination which said, in part:

"In view of the events which transpired regarding your going on leave without my approval on 31st May, 1975, we have decided to terminate your employment with ACT. It is unfortunate that your termination materialized in this way; we cannot condone a staff member unilaterally deciding when and when not to take leave."

(Pl. Exh. 4; 297a)

Plaintiff's post-
termination conduct

By letter dated June 1, 1975 (Sunday), Ms. Gatefield wrote to Jack Lowenthal, ACT's comptroller, and said, in part:

> "Should my leave turn out to be permanent, I would like to continue my (medical) insurance privately if this is possible."
>
> (Def. Exh. A; 284a)

Prior to leaving for England, Ms. Gatefield was informed on that same day by Mr. Lecht's secretary, Rosemary Donaldson, that Mr. Lecht had written the letter (225a/5-8), but she never responded in any way while she was in New York.

She denied that the June letter was written on that date, insisting that it was written five days later, on June 6, 1975 (76a/15-24), and so, as incredulous as that

may seem for a professional person with her background and training, her story must be considered true for purposes of this appeal. But she did not deny Miss Donaldson's testimony, and she could not possibly, and did not, deny that she never questioned anyone at ACT, including Mr. Lecht, after she received his June 2 letter, which she, herself, admitted was his "termination" letter (125a/14-16). Her only response to Mr. Lecht's termination letter was to seek alternative employment in London (128a/7-10).

## Preliminary

The central issue in this appeal is whether ACT had "cause" to terminate plaintiff when she walked out in the middle of the COINS project, despite ACT's request that she stay.

The evidence overwhelmingly shows that ACT had more than ample cause to terminate her. ACT had "cause" to terminate her for leaving in the middle of the COINS project. ACT had "cause" to terminate her for leaving before any replacement had been found. ACT had "cause" to terminate her for leaving in defiance of Mr. Lecht's request that she stay.

None of this is even contested. Instead, plaintiff has used such galling tactics as claiming she was not obliged to stay because Mr. Lecht only "asked" her to stay and did not "direct" her to stay. In other words, plaintiff maintains that although she was willing to abandon ACT at a very difficult time; was willing to endanger its relationship with a major new client and

risk loss of a follow-on contract, yet she would have honored all her commitments if only Mr. Lecht had used the right nuance of speech.

Even the evidence concerning plaintiff's actions after she left on her leave of absence, supports ACT's position: her failure to respond to Mr. Lecht's charges in his termination letter of June 2; her admission in her letter dated June 1, 1975, that she might be fired; her immediate search for a new job; her "explanation" of how a letter dated June 1 was actually written on June 6--each of these facts show her protestations of innocence to be a cynical mask.

Plaintiff counted on only one fact--that she was a flesh and blood individual suing a faceless corporate entity. That was the real basis for the verdict and nothing else. Neither logic nor justice could pierce that misplaced sympathy.

It was for cases such as this that the rules governing judgments n.o.v. and new trials were promulgated. If ever justice required the applications of those rules, it is this case.

I

Defendant is Entitled to a Judgment Notwithstanding the Verdict

Standard

In Brady v. Southern Ry. Co., 320 U.S. 476 (1943), the Supreme Court affirmed a judgment n.o.v. where the jury's verdict had been in favor of the deceased employee's widow. In doing so, it set out the standard:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict the court should determine the proceeding. . .by judgment notwithstanding the verdict."
>
> (320 U.S. at 479-480)

The Second Circuit has upheld numerous judgments n.o.v. in cases of verdicts which conflicted with the only

reasonable conclusions or inferences that could be made by the fact finders.

In O'Connor v. Pennsylvania Railroad Co., (2nd Cir., 1962), plaintiff claimed to have slipped on a patch of ice that had been left at defendant's station for a lengthy period of time. The court said while an inference of long-standing snow was possible, it was not reasonable because other snow had fallen, and granted judgment n.o.v., which was upheld in this circuit:

> "Even if it could reasonably be assumed that some traces of snowfalls might possibly have persisted on the terrace floor through some negligence of the defendant, the evidence overwhelmingly supports the inference that the snow or ice upon which O'Connor fell at 7:20 a.m. on February 16 was a product of the snowfall raging at the time."
>
> (308 F. 2d at 914)
> (emphasis supplied)

The court said:

> "The jury is simply not being permitted to make unreasonable findings of fact."
>
> (302 F. 2d at 914)

With regard to plaintiff's testimony, the court cited state authority which it held to be "in accord" with the federal standard:

> ". . .we are not required to give credence to a story so inherently improbable that we are morally certain it is not true. Bottalico v. City of New York, 281 App. Div. 339, 341, 119 N.Y.S. 2d 704 (1st Dept., 1953)."
>
> (308 F. 2d at 915, f.n. 1)

See also Fleet Messenger Service, Inc. v. Life Insurance Co. of North Amer., 315 F. 2d 593 (2nd Cir., 1963), where the court upheld a judgment n.o.v. for defendant on a life policy where "the evidence [did] not permit the inference that the insurer had this [pre-existing heart disease] knowledge" (315 F. 2d at 597).

In the case at bar, the trial court properly charged the jury that if they found that plaintiff had left her job to go on a leave of absence without defendant's consent or authorization, they must find for the defendant (232a/16-22).

This was a crucial issue for determination, yet there is no dispute as to the bulk of the circumstances surrounding Ms. Gatefield's leaving to go on a leave of absence.

-- There is no contention that Ms. Gatefield had any contractual right to take any leave of abasence; and she had none (Pl. Exh. 3; 275a et.seq.).

-- There is no dispute that ACT was in the midst of work on the COINS project when plaintiff left (152a/21 - 153a/2).

-- There is no dispute that the COINS project was a very important project for ACT; and that plaintiff was aware of this (95a/23-24).

-- There is no dispute that the COINS project was a novel one requiring experience and skilled personnel (147a/18 - 148a/5).

-- There is no dispute that Ms. Gatefield was a skilled program designer and that she had been assigned to the COINS project as a Senior Consultant, second only to the project manager (143a/20 - 144a/9; Pl. Exh. 5, 282a - 283a; 104a/5-12).

-- There is no dispute that ACT had, with plaintiff's knowledge, represented to First National City Bank that Ms. Gatefield

would be assigned to COINS for its entire period (102a/1-16 - 136a/3-6; Def. Exh. P at 295a).

-- There is no dispute that ACT was trying to please FNCB with its performance in order to get the follow-on contract and that plaintiff knew this (96a/3-12).

-- There is no dispute that plaintiff knew and understood that FNCB retained a right of approval of any personnel changes on the project (115a/23 - 116a/2).

-- There is no dispute that when plaintiff left she knew no one had been approved by FNCB to replace her (115a/23 - 116a/6; 116a/21-25).

-- There is no dispute that when plaintiff left she knew that ACT was itself not

satisfied with the person plaintiff wanted to replace her (68a/17-20).

-- There is no dispute that plaintiff knew that ACT did not want her to go on her leave of absence on May 30, 1975 (127a/4).

-- There is no dispute that plaintiff never rebutted any aspect of Mr. Lecht's termination letter of June 2, 1975, which specified her unauthorized leave as the reason for termination (128a/1-6).

-- There is no dispute that immediately upon receipt of Mr. Lecht's termination letter, plaintiff's only reaction was to seek alternative employment (128a/9-10).

All these undisputed and/or unrebutted circumstances alone would make it unreasonable to believe that plaintiff left on a two-month leave of absence on May 30, 1975 with ACT's consent. These circumstances support only one reasonable conclusion about the conversations between plaintiff and Mr. Lecht prior to her taking leave; that he never consented to her going on a leave of absence during the COINS project, and this is precisely what Mr. Lecht testified occurred. (194a/15-22).

In contrapoise to these undisputed facts and circumstances and to Mr. Lecht's unequivocal denial of extending his authorization, Miss Gatefield's sole claim to a verdict rests on her testimony that Mr. Lecht only "asked" her to stay and did not order her to stay!

On cross examination she testified:

"Q. You were upset that you had been terminated by ACT, is that right?

A. Yes.

Q. At the time you wrote this letter, Miss Gatefield, you knew, did you not, that Mr. Lecht had asked you not to leave?

A. Yes, he asked me not to leave on May 30.

Q. And you knew that by leaving, you were going to be countermanding his directions, didn't you?

A. It was not a direction. It was a request.

Q. In other words, he asked you not to leave?

A. He asked me to stay for another week.

Q. And he asked you not to leave on May 30 and to be back the following week, isn't that right?

A. He did not ask me to be back the following week. He just asked me not to leave as I testified this morning.

Q. But you left.

A. I did leave."

(126a/22 - 127a/15)
(emphasis supplied)

Plaintiff's attempts to convert a "request" not to go on leave into an affirmative authorization to go is spurious and all the more so because of her professional standing and responsibilities and her knowledge of the circumstances of the COINS project.

She knew full well the consequences her leaving might have on ACT's performance of the COINS contract, on its relationship with FNCB and on its chances for the follow-on contract, but she walked out nevertheless.

It is submitted that:

-- in view of the uncontested circumstances of the COINS project;

-- in view of Mr. Lecht's testimony which so reasonably flows from the surrounding circumstances;

-- in view of Miss Gatefield's admission that Mr. Lecht at least "asked" her not to go; and

-- in view of her failure to rebut the assertions of Mr. Lecht's letter of June 2, 1975,

it is clear that there is only one reasonable conclusion that the jury should have found: that plaintiff went on an unauthorized leave of absence and that defendant was therefore justified in terminating her.

Plaintiff's failure to respond to the termination letter is similar to White v. Ammann, 22 A.D. 2d 674 (1st Dept., 1964), in which an employee working in Iran left for an unauthorized leave of absence and was terminated. He sued, alleging a breach of employment contract, and claimed that the leave was authorized. The

trial court, sitting without a jury found for the plaintiff, but the Appellate Division analyzed the evidence and reversed, dismissing the complaint. Of particular importance to the Appellate Division was the fact that shortly after plaintiff left on his alleged leave of absence, he was notified of his termination, but failed to respond until after his alleged leave was over.

> "In any event the notation on the checks, which the plaintiff endorsed and cashed, gave notice that the defendants were claiming that the plaintiff's employment had terminated; yet he made no effort to refute this claim of the defendants or to set things right with them until 18 days later (or October 24), when he says he took his family to New York and reported at defendants' New York office for immediate transportation back to Iran. If the understanding was that plaintiff was to return to Iran, there is no reasonable explanation why he waited until the last day of his alleged 30-day leave of absence (October 24) for his return to the job, particularly in view of the fact that he was certainly on notice that the defendants were claiming that his employment had ended."
>
> (22 A.D. 2d at 675)
> (emphasis supplied)

The Appellate Division found that White's testimony was "not credible" (22 A.D. 2d at 675) and reversed.

In the case at bar, plaintiff never refuted Mr. Lecht's letter of June 2, 1975; never challenged his assertion that she had gone on an unauthorized leave and obviously knowing that she had been terminated for cause, sought other employment without any protest at all! On its face then, Miss Gatefield's testimony is less credible than the plaintiff in White since he at least did contest the termination, albeit 18 days later.

Moreover, the compelling circumstantial evidence surrounding the COINS project and its importance to defendant, the paramount significance of the design phase, and plaintiff's own admission that she was at least "asked" to stay, dictate that this court should do precisely what the Appellate Division did in White -- reverse and dismiss the complaint.

## II

## Defendant Should Be Granted a New Trial

Even if the court is of the opinion that defendant is not entitled to a judgment n.o.v., it should grant defendant a new trial because the verdict was clearly against the great weight of the evidence, because prejudicial evidence was admitted and because defendant has newly discovered evidence that would probably have altered the verdict.

### The verdict was against the great weight of the evidence.

A new trial should be granted where the verdict is against the great weight or preponderance of the evidence. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 249 (1940); Dyer v. MacDougall, 201 F. 2d 265 (2nd Cir., 1952); Diffenderfer v. Heublein, Inc., 285 F. Supp. 9 (D. Minn., 1968) aff'd 412 F. 2d 184; Benjamin v. Lehigh Valley R. Co., 10 F.R.D. 154 (W.D., N.Y., 1950).

A new trial may be granted even if there is substantial evidence in support of the verdict such as would prevent a judgment n.o.v. Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940); National Car Rental System v. Better Monkey Grip Co., 511 F. 2d 724, 730-731 (5th Cir., 1975); Urti v. Transport Commercial Corp., 479 F. 2d 766, 769 (5th Cir., 1953); Seven Provinces Insurance Co., Ltd. v. Commercial Industry Insurance Co., 65 F.R.D. 674 (W.D., Mo., 1975); Benjamin v. Lehigh Valley R. Co., 10 F.R.D. 154 (W.D., N.Y., 1950).

In Urti, supra, the court said:

> "It is possible that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, Boeing, 411 F. 2d 374, while at the same time the verdict would be 'against the great weight of the evidence.'"
>
> (479 F. 2d at 769)

And, in Seven Provinces Insurance Co., Ltd., supra, the court said that the court:

"...may grant a new trial
and set aside the verdict
even though there may appear
to be substantial evidence
to support the verdict."

(65 F.R.D. at 687)

Evidence in the
case at bar

Without repeating the evidence set out in the first part of the brief, it is clear that the evidence in ACT's favor far outweighs anything to the contrary.

One aspect of that evidence should, however, be further expanded--plaintiff's letter dated June 1, 1975.

In her letter dated June 1, 1975, plaintiff admitted that she was aware that she might be terminated for going on leave. She said:

"Should my leave turn out to
be permanent, I would like
to continue my [medical]
insurance privately if this
is possible."

(Def. Exh. A, 284a)

If that letter was, in fact, written on June 1, 1975, as it purports to be, it can only mean that plaintiff did not have to wait for Mr. Lecht's termination letter of June 2, 1975, to know that she might be terminated for going on a leave of absence--that she knew when she left work on May 30, 1975, that any leave of absence would be in direct defiance of Mr. Lecht's wishes.

In order to escape that admission, plaintiff testified that the June 1, 1975 date was a "mistake" and that she intended to write June 6, 1975 (126a/6-14). Coming from a person who is highly skilled and experienced in such a detailed profession as computer program design, this disclaimer is exceptionally hard to swallow. [This is especially so in light of the newly discovered evidence discussed later in this brief].

Assuming, however, that the letter was, in fact, written on June 6, 1975--after receipt of Mr. Lecht's termination letter (126a/6-14)--the decision in White v. Amman, supra, becomes especially cogent.

If White's delay of 18 days in responding to

his employers notification that he was being terminated for going on an unauthorized leave of absence was sufficient to compel the Appellate Division to reverse a judgment in his favor and dismiss his Complaint, then plaintiff's letter dated June 1, 1975 is certainly sufficient to warrant a new trial.

If plaintiff's letter was actually written on June 6, 1975, it means that she sat, pen in hand, writing a letter to ACT and never once contested or even alluded to Mr. Lecht's termination letter or its specific charge that she had left without permission, despite the fact that she had that letter before her.

The lesser omission in White was viewed as having such an unmistakable ring of falsity that the Appellate Division discounted plaintiff's credibility, as a matter of law, and reversed.

Ms. Gatefield's failure to rebut Mr. Lecht's charges, heaped on top of her unlikely story of "a mistake of five days" in the date of her letter can

only be viewed as the hallmark of fabrication.

When these facts are added to the compelling circumstances of the COINS project, to ACT's relationship with FNCB and the plaintiff's spurious insinuations that she would have stayed had Mr. Lecht "directed" her to stay instead of merely "asking" her to stay, it is clear that ACT is, at the very least, entitled to a new trial.

The trial court erroneously admitted prejudicial evidence.

It is well-settled that where the trial court has erroneously admitted prejudicial evidence a party is entitled to a new trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940); Midcontinent Broadcasting Co. v. North Central Airlines, Inc., 471 F. 2d 357 (C.A. Minn., 1973); Firemen's Fund Ins. Co. v. Aalco Wrecking Co., Inc., 466 F. 2d 179 (C.A., Mo., 1972), cert. den., 93 S. Ct. 1371, 410 U.S. 930; De Vito v. United Airlines, 98 F. Supp. 88, 97 (E.D., N.Y., 1951).

Since this case was brought on the basis of diversity jurisdiction and concerns a contractual relationship with contacts rooted solely in New York, it is New York substantive law which applies.

Under New York law, it is "well-settled" that the "optimum measure" of damages for wrongful discharge is lost salary for the unexpired term. Amaducci v. Metropolitan Opera Assn., Inc., 33 A.D. 2d 542, 543

(1st Dept., 1969). New York law also provides that admission of evidence of damages "in excess of this amount" is "irrelevant and prejudicial". Goldman v. City Specialty Stores, Inc., 285 App. Div. 880 (1st Dept., 1955).

In the case at bar, the court erroneously admitted evidence of damages in excess of lost salary for the unexpired term. It admitted in evidence, over defendant's objection, plaintiff's testimony as to expenses allegedly incurred in her search for new employment.

"Q. In conducting your search for new employment, did you incur any expenses?

A. Yes,I did. I incurred extra expense in getting to and from interviews; in entertaining people to discuss job situations and an increase in my phone bill.

I found it necessary to rent a typewriter and I also found it necessary to buy a telephone answering machine in order that I could be informed of my appointments when I was not in my apartment.

MR. LEWIS: Your Honor, I move to strike this on the grounds we discussed before.

THE COURT: Overruled."

(85a/11-22)
(emphasis supplied)

In addition, the trial court also permitted testimony as to alleged outstanding obligations owing from defendant to plaintiff--claims which were not even set out in the complaint or any other pre-trial proceeding.

"Q. At the time that your employment with ACT was terminated, did they have any outstanding obligations to you and did they owe you any money?

A. They owed me money for my expense report that I submitted on May 29.

Q. Do you remember what the amount of that expense report was?

A. $49.87, something like that.

MR. FERNEY: I would like to introduce Exhibit 6 which is a copy of it.

MR. LEWIS: Your Honor, may we approach the side bar for just a second?

(Discussion at the side bar off the record.)

THE COURT: Objection overruled.

Received."

(82a/24-83a/14)

The court also permitted the plaintiff to testify as to the alleged loss of certain "personal effects" she claimed were never returned by defendant. (R.47/1-R.48/8). This claim had not been set out in the pleadings either.

The admission of such evidence has been held to be "irrelevant and prejudicial" by the courts of New York, Goldman v. City Specialty Stores, Inc., supra, and defendant is entitled to a new trial as a matter of law.

The prejudicial effect of the admission of such testimony on the jury was underscored by the fact that of all the exhibits and testimony offered at trial, the jury returned and requested information on these three items alone (241a/20-242a/14).

Moreover, the trial court charged the jury that if plaintiff was to recover, she was "...also entitled to be compensated for whatever expense she reasonably incurred in attempting to find comparable employment" (233a/24 - 234a/2), and refused to modify this charge despite ACT's exception to it (240a/16-19).

These legal errors were prejudicial and entitle ACT to a new trial, as a matter of law.

Newly discovered evidence
entitles ACT to a new trial.

This action was brought on for trial with exceptional speed which prevented ACT from obtaining documentary proof which would have probably altered the outcome of the trial.

The Complaint was filed on October 16, 1975 (4a).

On November 18, 1975 ACT moved to dismiss the Complaint for lack of diversity jurisdiction (10a).

When that motion was denied, ACT filed its Answer and Counterclaim on January 15, 1976 (24a).

Plaintiff had not yet even filed her reply to ACT's Counterclaim when the trial was begun on April 13, 1976 (34a; 38a).

During the brief period permitted by the trial court, ACT was hampered by the fact that an important source of evidence, British Airways, kept its records in London, and not readily available.

ACT had subpoenaed British Airways to obtain evidence as to plaintiff's date of departure for London. Although ACT obtained certain information as to British Airways' rules and policies, specific information as to plaintiff's travel was not available at the time of trial because it was in London and would take "one to two weeks to obtain" (307a).

By April 26, 1976 ACT was informed that there would still be a delay of "some time" in supplying the necessary documentation (305a).

Finally, by May 6, 1976 ACT received confirmation that plaintiff had left for London on flight 590 on June 3, 1975 (303a).

Plaintiff testified that she left for London on June 2, 1975 (73a/7-10) and the discrepancy takes on great significance not only to show that plaintiff was not telling the truth, but because of the unrebutted testimony of Rosemary Donaldson.

Rosemary Donaldson was Mr. Lecht's secretary (221a/19) and a personal friend to plaintiff (226a/12-14).

She testified that she telephoned plaintiff on June 2, 1975 to tell her about the termination letter she had just prepared for Mr. Lecht (223a/16-17; 223a/21-23).

Miss Donaldson called plaintiff at her home in New York, but received no answer and so called a mutual friend to ask that plaintiff get in touch with her (224a/14-20).

Plaintiff called back that evening (224a/23-24), at which time Miss Donaldson told her what the termination

letter said (225a/6-8).

Based on plaintiff's testimony that she left for London on June 2, 1975, it was impossible to prove whether she was in New York or London when she called Miss Donaldson back.

With ACT's newly discovered evidence, it is now certain that plaintiff called from New York and thus knew, when she boarded her flight on June 3, 1975, that ACT considered that act as grounds for termination.

Moreover, plaintiff's "excuse" for misdating her letter dated June 1, 1976 is also exposed for what it is--a fabrication.

In trying to explain why her letter dated June 1, 1975 was actually written on June 6, 1975, plaintiff claimed that she was "upset" at the time she wrote the letter (126a/19-21; 77a/16-21) because she had just received Mr. Lecht's letter of termination (77a/205). In truth, she knew about it since June 2, 1975.

Had ACT been able to introduce the documentary evidence it now has, the jury would have seen that plaintiff's claim to misdating her letter because of "upset" over receipt of Mr. Lecht's letter was totally false, and that plaintiff actually wrote her letter on June 1, 1975, and thus admitted that she would probably be discharged for her conduct, even before she was terminated

The documentary evidence ACT has recently obtained would thus have probably altered the verdict in this case and is grounds for a new trial and one should be granted.

## III

## The Verdict Should Be Diminished by the Amount of Unemployment Compensation Plaintiff Received.

Defendant established on cross examination that plaintiff had received unemployment insurance beginning in July of 1975 (123a/10-13). The trial court, however, refused to permit defendant to ascertain the amount received by plaintiff (123a/14-22). The jury was thus deprived of this information in assessing the extent of damages.

Moreover, the trial court refused to charge the jury in accordance with defendant's requests that any damages should have been reduced by the amount of unemployment benefits collected during the applicable period and defendant excepted (240a/9-15).

The jury thus returned a verdict that failed to consider the effect of such benefits in reduction of damages and gave plaintiff a windfall and unjust recovery at defendant's expense.

The law is clear that damages for wrongful discharge should be reduced by the amount of unemployment benefits received by the employee. Satty v. Nashville Gas Co., 522 F. 2d 850, 855 (6th Cir., 1975) pet. for cert. filed, 44 U.S.L.W. 3254 (U.S., Oct. 7, 1975)(No. 75-536), Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 721 (7th Cir., 1969).

Those decisions have been followed in this Circuit. In Equal Employment Opportunity Commission v. Kallir, Philips, Ross, ____ F. Supp. _____ 74-3234, Oct. 8, 1976), a discharged employee won a jury verdict, but Judge Weinfeld reduced it saying:

> "The sum of $5,385 received by plaintiff as unemployment compensation since her discharge should further be deducted from the amount owed her."
>
> (Opinion, p. 10)

This Court should thus remand this case for a determination as to the amount of unemployment compensation plaintiff recovered so that it may be deducted from the verdict.

## Conclusion

For the above reasons, it is respectfully requested that ACT be granted judgment n.o.v. or, in the alternative, a new trial or, in the alternative, a diminution of the verdict by the amount of unemployment benefits plaintiff collected.

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A 202 Affidavit of Personal Service of Papers
**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND D CIRCUIT**

LUTZ APPELLATE PRINTERS, INC.

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*Index No.*

**MARIAN GATEFIELD,**
**Plaintiff - Appellee,**
*- against -*

**ADVANCED COMPUTER TECHNIQUES, CORP.,**
**Defendant- Appellant.**

*Affidavit of Personal Service*

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*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

*That on the* 26th *day of* October *19* 76 *at* **299 Park Avenue, New York, New York 10017**

*deponent served the annexed* Brief *upon*

**Ralph R. Ferney**

*the* **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

*Sworn to before me, this* 26th
*day of* Ocotber *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

**Reuben Shearer**